STATE OF MINNESOTA FILED DISTRICT COURT

COUNTY OF HENNEPIN 07 SEP 18 AM 8:26 FOURTH JUDICIAL DISTRICT

HENN. CO. DISTRICT COURT ADMINISTRATOR

State of Minnesota,

Plaintiff,

v.

Larry Edwin Craig,

Defendant.

Case No. 27-CR-07-043231

MEMORANDUM OF LAW OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA IN SUPPORT OF DEFENDANT

The American Civil Liberties Union (ACLU) and American Civil Liberties Union of Minnesota (ACLU of Minnesota) respectfully submit this proposed memorandum of law as *amici curiae* in support of Defendant.

SUMMARY OF ARGUMENT

The Minnesota law under which the defendant in this case was charged, and to which he pled guilty, applies both to speech protected by the United States Constitution, and to speech which is unprotected. That is true of the very words of the law, and it is true of its application in the context of this case.

The First Amendment and the Due Process Clause of the Constitution require that a law which covers both protected and unprotected speech:

1. not be so overbroad as to pose a real and substantial threat of ensnaring protected as well as unprotected speech;
2. provide clear standards, to law enforcement and to the public, about where it may be legitimately applied and where it may not;

3. be well crafted to serve the legitimate regulation of speech and not to ensnare protected speech.

It is very doubtful that, on the record as it appears so far, the prosecution in this case can meet any of those requirements. Given that, there is a very real possibility that this defendant pled guilty under circumstances in which the Constitution would not have permitted a conviction. That strongly suggests that in the interests of justice, the defendant should be able to withdraw his plea.

But there is an even more powerful reason to relieve the defendant of his plea here. Almost 30 years ago, the Minnesota Supreme Court ruled that the law involved here was unconstitutionally overbroad and vague. It preserved the law by restricting its application to "fighting words," a restriction which would almost certainly make any conviction in this case a near impossibility. In re S.L.J., 263 N.W.2d 412 (1978). Given that the defendant was charged with and permitted to plead under a law that the government has long known was deeply constitutionally flawed, and likely impossible to apply here, the interests of justice would best be served by allowing him to withdraw his plea so that the Court can determine if any prosecution here is constitutionally permissible.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On June 11, 2007, Defendant was arrested for allegedly soliciting sex from an undercover officer working a secret sting in a public restroom at the Minneapolis-St. Paul International Airport. Specifically, Defendant was charged with:

- "look[ing] through the crack in the door [to the undercover officer's stall,] . . . . look[ing] down at his hands, 'fidget[ing]' with his fingers, and then look[ing]

through the crack into [the undercover officer's] stall again[,] . . . . repeat[ing] this cycle for about two minutes;"

- "enter[ing] the stall [to the left of the undercover officer's stall] and plac[ing] his roller bag against the front of the stall door;"
- "tapp[ing] his right foot . . . and his toes several times," "mov[ing] his foot closer to [the undercover officer's] foot," and, after the undercover officer "moved [the undercover officer's] foot up and down slowly," "mov[ing] his right foot so that it touched the side of [the undercover officer's] left foot which was within [the undercover officer's] stall area;" and
- "swip[ing] his hand under the stall divider for a few seconds . . . in the direction from the front (door side) of the stall back towards the back wall[,] . . . . palm . . . facing towards the ceiling," enabling the undercover officer "to see the tips of his fingers on [the undercover officer's] side of the stall divider;" "swip[ing] his hand again for a few seconds in the same motion to where [the undercover officer] could see more of his fingers;" and "swip[ing] his hand in the same motion for a third time for a few seconds," enabling the undercover officer to "see that it was [his] left hand due to the position of his thumb" and to "see that [he] had a gold ring on his ring finger."

Arrest Report.

On June 26, 2007, Defendant was charged with disorderly conduct under Minn. Stat. § 609.72(1)(3) and interference with privacy under Minn. Stat. § 609.746(1)(c). On August 8, 2007, Defendant entered a plea of guilty only to the charge of disorderly conduct under Minn. Stat. § 609.72(1)(3). Minn. Stat. § 609.72(1)(3) provides in part:

> Whoever does any of the following in a public or private place . . . knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor:□. . . Engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or abusive language tending reasonably to arouse alarm, anger, or resentment in others.

On September 10, 2007, Defendant moved to withdraw his plea.

ARGUMENT

I. THE MINNESOTA LAW INVOKED HERE IS UNCONSTITUTIONALLY OVERBROAD.

a. The Minnesota Law Under Which Defendant Was Charged Applies On Its Face to Both Constitutionally Protected Speech and Unprotected Speech.

The Minnesota law under which defendant was charged and to which he pled guilty punishes "offensive, obscene or abusive language" which reasonably tends to arouse "alarm, anger or resentment" if the speaker knows or has reasonable grounds to know it will tend to "alarm, anger or disturb" others. Minn. Stat. § 609.72(1)(3).

It is long established law that speech may not be made a crime solely because a listener could be offended, disturbed, alarmed or even angered by its content: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Texas v. Johnson, 491 U.S. 397, 409, 414 (1989) (citations omitted) (law against flag desecration cannot be upheld on the basis others will be angered by acts it covers); see also Cohen v. California, 403 U.S. 15, 25 (1971) (holding that, "so long as the means are peaceful, the communication need not meet standards of acceptability," and striking down conviction for wearing words "fuck the draft" in a public place) (quotation omitted).

Since the law the state has applied to this defendant makes it a crime to use offensive language, and since the use of offensive language alone cannot be made a crime, the law is unconstitutionally overbroad on its face. The Minnesota Supreme Court said as much almost 30 years ago. In In re S.L.J., 263 N.W.2d 412, 418-419 (1978), the Court held that because section 609.72(1)(3) applied not to language which would incite a breach of the peace—which could be prohibited—but to "offensive, obscene or abusive language," it was overbroad and vague. Unless it could be narrowed by construction the Court held, it violated the First Amendment. In re S.L.J., 263 N.W.2d at 418-419

b. The Minnesota Law Under Which Defendant Was Charged Is Overbroad As Applied to Sexual Speech as Well.

The First Amendment's prohibition on making "offensive" speech a crime applies with no lesser force when the speech is sexual: "In evaluating the free speech rights of adults, we have made it perfectly clear that sexual expression which is indecent but not obscene is protected by the First Amendment." Reno v. American Civil Liberties Union, 521 U.S. 844, 874 (1997) (quotation and citation omitted); see also Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 (1975) ("[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.").

Just as the state can make the use of "fighting words"—words likely to incite violence—a crime, it can make the solicitation of an unlawful act a crime. See Brown v. Hartlage, 456 U.S. 45, 55 (1982) (recognizing that even political speech that solicits an unlawful act may be denied constitutional protection). The government may not, however, make the solicitation of a lawful act a crime. See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 772-73 (1976)

(recognizing that even commercial speech that solicits a lawful act may not be denied constitutional protection).

Sex is a constitutionally protected liberty interest. Griswold v. Connecticut, 381 U.S. 479 (1965); Doe v. Ventura, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct., Hennepin County, May 15, 2001). Thus, the government may make sex a crime only where it has a constitutionally sufficient justification for doing so. See Lawrence v. Texas, 539 U.S. 558, 578 (2003). The government does not have a constitutionally sufficient justification for making private sex a crime. Id. ("The State cannot . . . mak[e] . . . private sexual conduct a crime."). It follows that an invitation to have private sex is constitutionally protected and may not be made a crime. This is so even where the proposition occurs in a public place, whether in a bar or in a restroom. See Pryor v. Municipal Court, 599 P.2d 636, 645-46 (Cal. 1979) (recognizing that public proposition of private sex may not be made a crime).

Thus, courts all over America have held that an invitation to have lawful sex may not be made a crime. See, e.g., Provo City Corp. v. Willden, 768 P.2d 455, 459 (Utah 1989) ("Unfortunately, in its zeal to eliminate [publicly] offensive behavior, the City has chosen to fashion a tool that sweeps far too deeply into the protected province of the first amendment."); New York v. Uplinger, 447 N.E.2d 62, 63 (N.Y. 1983) ("Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose."); Pedersen v. City of Richmond, 254 S.E.2d 95, 98 (Va. 1979) ("It would be illogical and untenable to make solicitation of a non-criminal act a criminal offense."); Oregon v. Tusek, 630 P.2d 892, 895 (Or. Ct. App. 1981) ("The statute as it now stands

. . . makes it a crime to ask another person to participate in an act which is not itself a crime. We find ourselves in agreement with [Pedersen and Cherry]."); Cherry v. Maryland, 306 A.2d 634, 640 (Md. Ct. App. 1973) ("While solicitation to commit a crime may properly be proscribed, it would be anomalous to punish someone for soliciting another to commit an act which is itself not a crime.")

The risk of conviction for inviting someone to have lawful sex is real and substantial, as the cases cited above demonstrate all too well. Because Section 609.72(1)(3) draws no distinction between invitations to have sex in private and invitations to have sex in public, and instead makes liability turn on whether the speech is "offensive, obscene or abusive," it is overbroad when applied to sexual speech just as it was when applied to insults hurled at police officers.[1] See S.L.J., 263 N.W.2d at 418-19

II. THE GOVERNMENT IS UNLIKELY TO BE ABLE TO SHOW THAT, EVEN IF NARROWED TO MAKE IT CONSTITUTIONAL, THE LAW WAS VIOLATED HERE.

"[L]egislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion for sweeping within its condemnation what is permissible expression." Kingsley Int'l Pictures Corp. v. Regents of Univ. of State of N.Y., 360 U.S. 684, 694 (1959). In S.L.J., the Minnesota Supreme Court acknowledged that the language that made section 609.72(1)(3) overbroad also made it vague. Because the statute turns on the use of "offensive" words alone, and had no language limiting punishment to words that might "incite an immediate breach of the peace," the law failed even to suggest, either to law enforcement or the populace, what conduct could be made a crime. 263 N.W.2d at 418-419.

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[1] Given the statute's real and substantial overbreadth, it may be that it is simply invalid. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972).

An otherwise vague and overbroad statute might be enforceable if it were possible to give it a narrowing construction that provided a clear constitutional standard for enforcement. See Gooding v. Wilson, 405 U.S. 518, 520 (1972).

This Court could attempt to apply the narrowing construction placed on this statute by the Minnesota Supreme Court; that is, only words that "tend to incite an immediate breach of the peace" can be punished. S.L.J., 263 N.W.2d at 419. But it is very doubtful any violation of that standard could be made out in this case. The undercover officer would hardly breach the peace in response to the defendant's words; his whole reason for being present was to solicit such a message. Nor would the defendant have had reason to think the undercover officer would be disturbed, since the officer signaled that the proposition was welcome. See Arrest Report. Moreover, the only person who witnessed the communication was the undercover officer. See id

It is far from clear under S.L.J. that the Minnesota Supreme Court left trial courts with the authority to create further narrowing constructions of section 609.72. See 263 N.W.2d at 419 (section 609.72 "must be declared unconstitutional as a violation of the First and Fourteenth Amendments *unless* it *only* proscribes the use of 'fighting words.'") (emphasis added).

But even if this Court could interpret the law to apply only to an invitation to have sex in public, a conviction here would be extremely unlikely. The Minnesota Supreme Court has already ruled that two men engaged in sexual activity in a department store restroom with the stall door closed had a reasonable expectation of privacy. They were, the Court held, therefore acting in a private, not a public place. State v. Bryant, 287 Minn. 205, 209-210 (1970) (conviction reversed). And the state seems to have

acknowledged that Bryant is controlling here. When it charged the defendant with interference with privacy, it alleged that he had looked into a "place where a reasonable person would have an expectation of privacy," Minn. Stat. § 609.746(1)(c). That leaves no possibility of a conviction for soliciting an unlawful act under even a narrowed section 609.72.

III. THE GOVERNMENT MUST SHOW THAT ITS SECRET STING WAS CAREFULLY CRAFTED TO AVOID UNNECESSARILY ENSNARING INVITATIONS TO HAVE PRIVATE SEX.

Even though it appears at best, very unlikely that in this case, the statute was being applied to unprotected speech, the state could assert the power to apply the statute to solicitations for sex which is not unlawful. However, to do that, it would have to show that its use of the law was carefully crafted to avoid unnecessarily ensnaring lawful communications about sex. See Ashcroft v. Free Speech Coalition, 535 U.S. 234, 245 (2002) ("The prospect of crime . . . by itself does not justify laws suppressing protected speech.") (citation omitted); id. at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter.") (quotation omitted). Put another way, the government would have to show that the secret sting was carefully tailored to furthering its interest in deterring public sex. See Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton, 536 U.S. 150, 168 (2002) (striking down ordinance making canvassing a crime because its enforcement against both commercial canvassing and non-commercial canvassing was not carefully tailored to furthering interest in preventing fraud).

But again, it seems very unlikely that the government could make the requisite

showing here. More often than not, a secret sting is far less carefully tailored to furthering an interest in deterring public sex than a posted sign warning that the premises are patrolled. A posted sign is far less likely to risk ensnaring invitations to have private sex than a secret sting. At the same time, a posted sign is not only as likely to deter public sex as, but indeed far more likely to deter public sex than, a secret sting, whose existence is known only to those who are arrested and not to those who follow in their wake.

These propositions appear to be borne out in practice. Many police departments, including the Minneapolis Police Department, have rejected secret stings as enforcement mechanisms. Max Follmer, "Craig Bust Leads to Debate Over Bathroom Stings," Huffington Post (Sept. 7, 2007) (available at http://www.huffingtonpost.com/2007/09/07/craig-bust-leads-to-debat_n_63481.html). Their decisions reflect the fact that "[m]ost researchers and practitioners agree that focusing solely on arresting those engaging in public sexual activity is unlikely to reduce the overall scope of the problem." United States Dep't of Justice, Office of Cmty. Oriented Policing Servs., "Illicit Sexual Activity in Public Places," at 17 (Apr. 2005) (available at http://www.cops.usdoj.gov/mime/open.pdf?Item=1460). Indeed, in light of this fact, the Office of Community Oriented Policing Services of the Department of Justice lists "[p]osting notices" first among its recommended responses to illicit sexual activity in public places. Id. at 20. In contrast, it lists "[u]sing undercover decoys" first under the heading "RESPONSES WITH LIMITED EFFECTIVENESS." Id. at 26.

The government would be hard-pressed to explain its choice of the secret sting as its enforcement mechanism given the existence of alternatives that, more likely than not, would have been more carefully tailored to furthering its interest in deterring public sex.

IV. DEFENDANT SHOULD BE PERMITTED TO WITHDRAW HIS PLEA.

The record shows there is a very significant possibility this defendant pled guilty on the basis of conduct that could not constitutionally have been the basis for a conviction. Given that very real possibility, the interests of justice would best be served by allowing him to withdraw his plea so that the Court can determine if a constitutional prosecution was possible at all here, and if so, whether the defendant could constitutionally be convicted. See, e.g., Gooding v. Wilson, 405 U.S. 518 (1972) (upholding grant of writ of habeus corpus to defendant convicted under constitutionally overbroad law prohibiting use of "abusive" language).

CONCLUSION

For the foregoing reasons, the defendant should be permitted to withdraw his plea, and, should the state recharge him, to contest the constitutional validity of any prosecution.

September 17, 2007.

Respectfully submitted,

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